will have little substance so long as the United States continues to ignore international law regarding the rights of foreign nationals in its territory.

Each of these organizations recognizes the importance of the rule of law and U.S. compliance with international law. *Amici* have observed firsthand the negative consequences that arise when federal, state, and local governments fail to comply with international law. Regrettably, such issues arise on an almost daily basis. While the United States has ratified the Vienna Convention on Consular Relations, *done* Apr. 24, 1963, 21 U.S.T 77, 596 U.N.T.S. 261 ("Vienna Convention"), state and local governments have failed to comply fully with its obligations. Noncompliance is compounded by the refusal of federal courts to provide meaningful review and reconsideration of Vienna Convention violations. Without appropriate guidance from this Court, state courts and lower federal courts will continue to disregard international law and U.S. treaty obligations as the Supreme Courts of Virginia and Oregon have done.

While *Amici* pursue and protect a wide variety of legal interests, they all share a deep commitment to the rule of law. Thus, the participation of *Amici* will assist this Court in understanding the negative implications and practical consequences of U.S. failure to comply with the Vienna Convention.

SUMMARY OF ARGUMENT

Long before these cases arose, the Executive and Legislative branches of the United States government made the policy choice entrusted to them by the United States Constitution to ensure reciprocal protection for U.S. citizens abroad by negotiating and ratifying the Vienna Convention. Article 36 of the Vienna Convention provides

that foreign nationals must be informed of their right to seek consular assistance when detained.[2] It is firmly established that Article 36 creates individual rights and that the United States is legally obligated to recognize these rights in its courts.

Respect for the rule of law is an essential component of U.S. foreign policy. Foreign governments expect, therefore, that the United States will comply with its obligations under the Vienna Convention, a duly ratified treaty. Indeed, it is in our national interest to do so. The Vienna Convention protects vulnerable migrants in our country. But it also protects U.S. citizens abroad, including tourists, business travelers, and military personnel. Failure to adhere to the obligations set forth in the Vienna Convention will undermine consular assistance in the United States and violations will inevitably be replicated abroad.

In *Bustillo v. Johnson*, No. 042023 (Va. March 7, 2005) and *State v. Sanchez-Llamas*, 108 P.3d 573 (Or. 2005), two state courts have completely disregarded the Vienna Convention. Quite simply, the failure of these courts to respect U.S. treaty obligations undermines the rule of law,

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[2] These branches also negotiated and ratified the related Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *done* Apr. 24, 1963, 21 U.S.T. 77 ("Optional Protocol"). The Optional Protocol vests the International Court of Justice ("ICJ") with jurisdiction to resolve disputes over the interpretation and application of the Vienna Convention. Although the United States recently withdrew from the Optional Protocol, this withdrawal does not change the U.S. agreement to fulfill its obligations under the Vienna Convention. Nor does the U.S. decision to withdraw from the Optional Protocol change the U.S. position on the Vienna Convention itself: specifically, that the substantive guarantees of the Vienna Convention should be enforced by local, state, and federal authorities.

long a central feature of U.S. foreign policy. These state court decisions also threaten the ability of consular officials to effectively protect the interests of their nationals. Because the protections afforded by the Vienna Convention are reciprocal in nature, noncompliance by the United States will be replicated abroad, harming the interests of U.S. citizens that travel and work around the world.

For these reasons, this Court should reverse the judgments of the Supreme Courts of Virginia and Oregon and grant relief that is consistent with the obligations set forth in the Vienna Convention and with the U.S. policy of promoting a unified rule of law that respects our international obligations.

ARGUMENT

I. RESPECT FOR THE RULE OF LAW IS AN IMPORTANT COMPONENT OF U.S. FOREIGN POLICY

Throughout its history, the United States has consistently asserted that violations of international law have serious consequences for international order.[3] No less a realist than former Secretary of State Henry A. Kissinger

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[3] The United States has repeatedly asserted that international law is "the web of mutual obligation which binds us together . . . [and] shields us from chaos and from disorder." Memorial of United States of America, United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1982 I.C.J. Pleadings 228 (Dec. 29, 1979) (*quoting* Secretary of State Cyrus Vance, Remarks to U.N. Security Council). Moreover, the failure to redress violations of international norms "promotes repetition" of violations, eroding international order. Or. Arg. of United States, United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1982 I.C.J. Pleadings 255.

has noted that "[t]he United States is convinced in its own interest that the extension of legal order is a boon to humanity and a necessity." Henry A. Kissinger, *International Law, World Order, and Human Progress*, 73 Dep't St. Bull., 353, 354 (Sept. 8, 1975). *See also* Charles N. Brower, Acting Department of State Legal Adviser, *International Law as an Instrument of National Policy*, 68 Dep't St. Bull., 644, 644 (May 21, 1973) ("States comply with [international] law . . . because it is politic to do so."); John Foster Dulles, Testimony Before Congress Regarding the Ratification of the U.N. Charter, *quoted in* Ambassador Madeleine K. Albright, *Enforcing International Law*, Speech Before the Philadelphia Bar Association at 9 (June 15, 1995), *at* http://dosfan.lib.uic.edu/ERC/law/press_statements/950615.html ("As a nation, we have, more than any other, striven for the supremacy of law as an expression of justice. Now, we are seeking to establish world order based on the assumption that the collective life of nations ought to be governed by law—law as formulated in the Charter of the U.N. and other international treaties, and law as enunciated by international courts.").

In addition, the United States has promoted respect for international law because it reflects important American values; "[i]t is a repository of our experience and our idealism." Kissinger, *supra*, at 354. Accordingly, U.S. administrations have repeatedly reaffirmed the commitment of the United States to honoring its international law obligations. *See, e.g.*, Madeleine K. Albright, *U.S. Efforts to Promote the Rule of Law*, Remarks at the Condon-Falkner Distinguished Lecture, University of Washington School of Law, *in* U.S. Dep't of St. Dispatch, Nov. 1998, at 6 ("Law is a theme that ties together the broad goals of our foreign policy."); Letter from President Ford to Seymour J. Rubin, *reprinted in* States-International Status, Attributes, and Types: Rights and Duties of States: Nonintervention in

Internal Affairs 1975 *Digest* § 1, at 16 ("It is my intention that the Government of the United States shall observe international law and endeavor to promote its strengthening in all areas to which it applies."); Kissinger, *supra*, at 362 ("[D]edication to international law has always been a central feature of our foreign policy.").

In recent years, the Bush administration has reaffirmed the important role that the rule of law plays in U.S. foreign policy. U.S. Secretary of State Condoleezza Rice has emphasized the importance of the rule of law in promoting stability and cooperation throughout the world:

> America is a country of laws. When we observe our treaty and other international commitments, our country -- other countries are more willing to cooperate with us and we have a better chance of persuading them to live up to their own commitments. And so when we respect our international legal obligations and support an international system based on the rule of law, we do the work of making the world a better place, but also a safer and more secure place for America.

U.S. Secretary of State Condoleezza Rice, Remarks at the Annual Meeting of the American Society of International Law (Apr. 1, 2005), *at* http://www.state.gov/secretary/rm/2005/44159.htm. Similarly, the U.S. Deputy Permanent Representative to the United Nations noted in remarks to the U.N. Security Council:

> [E]stablishing and maintaining the rule of law has been an enduring theme of

> American foreign policy for over two centuries. Notably, the U.S. Constitution specifically provides that treaties shall be the supreme law of the land. We therefore do not enter into treaties lightly because we believe the importance of the rule of law to a successful system of peace cannot be overstated.

Ambassador James B. Cunningham, United States Deputy Permanent Representative to the United Nations, Statement on Justice and the Rule of Law to the U.N. Security Council at 1 (Sept. 24, 2003), *at* http://www.un.int/usa/03_147.htm. Thus, promotion of the rule of law historically has been a defining value of U.S. foreign policy and a key strategy for promoting peace and stability throughout the world.

> As a nation founded by law, the United States is the unflagging champion of the rule of law. By working together in support of the rule of law, we believe the international community can strengthen the peace and help conflict-ridden societies build a better future. For two hundred years, this has been our firm conviction and practice, and it will remain our first article of faith.

Id. at 2. *See also* Marc Grossman, Under Secretary for Political Affairs, U.S. Department of State, Remarks to the Center for Strategic and International Studies at 1 (May 6, 2002), *at* http://www.state.gov/p/9949.htm ("Let me get right to the point. . . . Here's what America believes in: We believe in justice and promotion of the rule of law.").

Foreign governments, therefore, expect that the United

States will be a leader in complying with the obligations set forth in the Vienna Convention. In so doing, it demonstrates to "the world that the United States does indeed take its international law responsibilities seriously." William Howard Taft IV, U.S. Department of State, Legal Adviser, Remarks to the National Association of Attorneys General at 5 (March 20, 2003), *at* http://usinfo.state.gov.

In sum, the interests of all persons – from foreign nationals in the United States to Americans abroad – are best served by adherence to the rule of law as embodied in the Vienna Convention. Failure to adhere to the rule of law would compromise this most American value and would undermine the work that *Amici* do.

II. THE CONSULAR ASSISTANCE PROVISIONS OF THE VIENNA CONVENTION ARE ESSENTIAL FOR PROTECTING THE RIGHTS OF FOREIGN NATIONALS

Governments have long recognized the importance of consular relations. Luke Lee, Consular Law and Practice 3-7 (2d ed. 1991); Oppenheim's International Law 1132-34 (Robert Jennings and Arthur Watts eds., 9th ed. 1992); Constantin Economides, *Consuls*, *in* 1 Encyclopedia of Public International Law 770 (Rudolf Bernhardt ed. 1992). The Vienna Convention on Consular Relations, which was adopted in 1963 and has been ratified by 168 countries, has been referred to as "undoubtedly the single most important event in the entire history of the consular institution." Lee, *supra*, at 27.

The Vienna Convention defines and guarantees consular rights, privileges, and duties among signatory

states.[4] One of the most important responsibilities of consular officials is to protect their nationals. Accordingly, Article 36(1)(a) provides that consular officials shall be free to communicate with, and have access to, their nationals at all times. Foreign nationals shall have the same freedom of communication and access to consular officials. A particularly sensitive issue arises when a foreign national is detained by law enforcement officials. In these cases, Article 36(1)(b) of the Vienna Convention provides that law enforcement officials of signatory states must notify detained foreign nationals that they have a right to communicate with, and have access to, their consular officials. If the detained national makes such a request, the appropriate consular post must be notified. In addition, Article 36(1)(c) grants consular officials the right to visit, converse and correspond with detained foreign nationals and to arrange for their legal representation. Finally, Article 36(2) provides that the laws and regulations of each signatory state must enable full effect to be given to these rights. In sum, Article 36 of the Vienna Convention serves two broad goals. Through consular assistance, foreign nationals can gain a greater awareness of the nature and scope of the legal proceedings that affect them. At the same time, consular assistance allows foreign governments to monitor the safety and fair treatment of their nationals in such proceedings.

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[4] Article 5 of the Vienna Convention lists a number of consular functions. These cover a wide variety of responsibilities, including: furthering the development of commercial, economic, cultural and scientific relations between signatory states; issuing passports and travel documents; serving as a notary and civil registrar; and transmitting judicial documents or executing letters rogatory or commissions to take evidence.

It is essential to recognize the purpose of consular assistance when interpreting Article 36.[5] Foreign nationals are at a distinct disadvantage when detained by law enforcement officials.[6] Indeed, migrants are a particularly vulnerable group.[7] They may have a poor command of the

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[5] It is a fundamental canon of interpretation that "[a]n international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose." Restatement (Third) of the Foreign Relations Law of the United States § 325(1) (1987). *See also* Norfolk Southern Ry. v. James N. Kirby, Pty Ltd., 125 S. Ct. 385, 397 (2004) *citing* Green v. Biddle 21 U.S. 1, 89 (1823) ("[W]here the words of a law, treaty, or contract, have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded.").

[6] *See, e.g.*, Amnesty International, United States of America: Osvaldo Torres, Mexican National Denied Consular Rights, Scheduled to Die (Apr. 2, 2004), *available at* http://web.amnesty.org/library/Index/ENGAMR510572004. ("A primary task of all consuls is to render assistance to their citizens abroad and to see that they receive fair, equal and humane treatment while in custody. Consular access and assistance are indispensable whenever foreign nationals face prosecution and incarceration under local legal systems, especially when a death sentence may result. Timely consular intervention ensures that foreign detainees understand their legal rights and have the means to mount a proper defence.").

[7] Unsurprisingly, agreements concerning the rights of migrants emphasize the significance of consular assistance. For example, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *entered into force* Dec. 18, 1990, art. 16(7) (Dec. 18, 1990), requires that consular notification information be provided to a migrant worker or a member of his or her family when arrested or detained in other manner. Significantly, the provision is almost identical to Article 36 of the Vienna Convention. *See also* U.S. Department of State, Implementing the Summit of the Americas Migrant Workers Initiative (Apr. 7, 2000) ("[T]he United States takes the position that all foreign nationals are entitled to

English language and will likely be unfamiliar with the U.S. criminal justice system. Their understanding of the entire criminal process, including the role of law enforcement officials, public defenders, and judges, may be profoundly influenced by experiences in their countries of origin. Accordingly, consular officials act as a cultural bridge to foreign nationals. While consular officials do not provide legal advice, they provide foreign nationals with critical information that allows them to understand any legal advice provided by defense attorneys. Thus, consular assistance is fundamentally and qualitatively distinct from assistance provided by defense counsel.

In light of these considerations, it is not surprising that the International Court of Justice has indicated that Article 36 creates individual rights and that signatory states must protect these rights.[8] On two occasions, the ICJ has definitively interpreted the Vienna Convention in cases involving foreign nationals who were not informed of their right to seek consular assistance in the United States.[9] *See LaGrand Case* (F.R.G. v. U.S.) 2001 I.C.J. 104 (June 27) ("*LaGrand*"); *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. (March 31) ("*Avena*").

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consular notification and access, regardless of their visa or immigration status in the United States. Thus 'illegal' aliens have the same rights to consular assistance as do 'legal' aliens. There is no reason, for purposes of consular notification, to inquire into a person's legal status in the United States.").

[8] To reiterate, the U.S. decision to withdraw from the Optional Protocol has no bearing on the ICJ's authoritative and binding interpretations of the Vienna Convention.

[9] The opinions of the International Court of Justice are available at www.icj-cij.org.

In June 2001, the ICJ considered the Vienna Convention in an action filed by Germany against the United States. *LaGrand*, *supra*. In *LaGrand*, the ICJ held that Article 36(1) of the Vienna Convention creates individual rights and the clarity of these provisions "admits of no doubt." *LaGrand*, para. 77. The ICJ went on to find that the United States had violated those rights and that procedural default rules could not be used to bar a defendant from making a Vienna Convention claim. *Id.* para. 91.

In March 2004, the ICJ considered the Vienna Convention in an action filed by Mexico against the United States. *Avena*, *supra*. In *Avena*, the ICJ affirmed that the Vienna Convention creates individual rights. *Avena*, para. 40. It then held that the United States violated the rights of fifty-one Mexican nationals. *Id.*, para. 153. To remedy these violations, the ICJ ruled that the United States must provide "by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals" and take into account the rights set forth in Article 36 as well as relevant portions of the *Avena* judgment. *Id.*, para. 153(9). The ICJ specified that review and reconsideration must be effective and provide "a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration." *Id.*, para. 139. The ICJ also reaffirmed that the procedural default rule cannot be used to preclude a defendant from raising a Vienna Convention violation. *Id.*, para. 134. Application of procedural default rules would effectively nullify the right to review and reconsideration as mandated by the ICJ. Significantly, the ICJ stated that its conclusions applied to all foreign nationals subject to similar situations in the United States.

> To avoid any ambiguity, it should be made clear that, while what the Court has stated concerns the Mexican nationals whose cases have been brought before it by Mexico, the Court has been addressing the issues of principle raised in the course of the present proceedings from the viewpoint of the general application of the Vienna Convention, and there can be no question of making an *a contrario* argument in respect of any of the Court's findings in the present Judgment. In other words, the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States.

Id., para. 151.

In sum, the Vienna Convention is essential for protecting the rights of foreign nationals. As a signatory to the Vienna Convention, the United States is obligated to protect these rights. But this has not occurred.

III. FAILURE TO COMPLY WITH THE VIENNA CONVENTION WILL UNDERMINE CONSULAR ASSISTANCE IN THE UNITED STATES AND VIOLATIONS WILL BE REPLICATED ABROAD

Over thirty years ago, the United States, through the power granted to its Executive and Legislative branches of government by the United States Constitution, made the policy choice to sign and ratify the Vienna Convention,

making it and its attendant provisions the supreme law of the land. *See* U.S. Const. art. II, § 2, cl. 2 & art. VI, cl. 2.

On April 24, 1963, the United States signed the Vienna Convention. The Senate subsequently approved the Vienna Convention on October 22, 1969, and it was formally ratified on November 12, 1969. The instrument of ratification was deposited on November 24, 1969, and it entered into force for the United States on December 24, 1969. As the U.S. State Department has indicated, the Vienna Convention creates obligations that are binding on federal, state, and local governments. *See* U.S. Dep't of St., *Consular Notification and Access* 44 (2005), *available at* http://travel.state.gov/pdf/CNA_book.pdf.[10]

The consular posts of governments throughout the world, including those of the United States, follow a settled body of procedures to implement the rights afforded by the Vienna Convention for their respective nationals detained abroad. In the event a national is arrested or otherwise detained within a foreign country, Paragraph 1 of Article 36 of the Vienna Convention sets out that "consular offices shall have the right to visit a national . . . who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation." Vienna

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[10] The United States became obligated to comply with the Vienna Convention immediately upon ratification, and no implementing legislation was necessary. Upon submitting the Vienna Convention to the Senate, the Executive branch stated that the treaty was "entirely self-executive [sic] and does not require any implementing or complementary legislation." S. Exec. Rep. No. 91-9, 91st Cong., 1st Sess. at 2 & 5 (1969) (appendix) (statement by J. Edward Lyerly, Deputy Legal Adviser). More recently, the U.S. State Department has indicated that "[i]mplementing legislation is not necessary . . . because executive, law enforcement, and judicial authorities can implement these obligations through their existing powers." Consular Notification and Access, *supra*, at 44.

Convention, art. 36, para. 1(c).

All U.S. Foreign Service posts are instructed to ensure that the protections of the Vienna Convention are provided to U.S. citizens abroad. *See* U.S. Dep't of St., 7 *Foreign Affairs Manual*, *available at* http://travel.state.gov/pdf/CNA_book.pdf. As our consular officials are informed, "[f]ew of our citizens need that assistance more than those who have been arrested in a foreign country or imprisoned in a foreign jail." *Id.* § 412 (Sept. 1, 2004). U.S. policy includes the prompt delivery of key information to detained individuals after their arrest. These materials include information regarding judicial procedures the individual is likely to experience, § 415.3 (Sept. 1, 2004), and tailored lists of lawyers with details including languages spoken and specialties. *Id.*, § 415.4 (Sept. 1, 2004); § 991 (Aug. 30, 1999); § 992 (Aug. 30, 1994). Under the State Department's *Foreign Affairs Manual*, consular officers are expected "to be particularly active in, and to fully engage in, the [detained individual's] case during the often-lengthy pretrial period." *Id.*, § 432 (Aug. 26, 2004). The *Foreign Affairs Manual* also indicates that consular officers should frequently visit detained nationals to "monitor whether attorneys retained by U.S. inmates are in contact with them and rendering them appropriate and adequate counsel and other legal services" as well as to "keep prisoners updated on any developments that may relate to their cases such as information obtained from defense counsels, prosecutors, [and] judges." *Id.*, § 433.1 (Aug. 26, 2004). These practices continue into the appellate stage, where U.S. policy instructs consular officers to continue providing appropriate services, including acting as a liaison to the detained individual's attorney and judicial authorities. *Id.*, § 454 (Oct. 28, 2004).

U.S. consular posts are not unique in the services they

provide. For example, Mexican consular officials offer specific assistance to Mexican nationals detained in the United States. *See Torres v. Oklahoma*, No. PCD-04-442, at 10 (Okla. Crim. App. May 13, 2004) (Chapel, J., specially concurring). Pursuant to Mexico's procedures, "[c]onsular officials monitor defense counsel's efforts, speak regularly with defense counsel, the defendant and his family, and attend court proceedings." *Id.* (Chapel, J., specially concurring). Consular officials also assist in gathering evidence and providing funds for experts, investigators, DNA testing, and jury consultants. *See id.* at 10-11 (Chapel, J., specially concurring). The Mexican government also "obtains and provides official documents from institutions in Mexico such as schools and hospitals, searches for criminal records, and assists attorneys traveling in Mexico with logistical support, translators, and witness identification and preparation." *Id.* at 11 (Chapel, J., specially concurring).

If U.S. courts fail to honor the Vienna Convention, the procedures developed by foreign governments to assist and protect the rights of their citizens are of little benefit. These same rights afforded by the Vienna Convention to Americans abroad would also be jeopardized. The protections of the Vienna Convention are reciprocal in nature, and U.S. noncompliance will inevitably be replicated abroad. This basic feature of international law – its reciprocal nature – is recognized and accepted by the United States.[11] The U.S. Legal Adviser has acknowledged the reciprocal nature of the Vienna Convention:

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[11] As the U.S. government has repeatedly asserted "[r]eciprocity . . . underlies all relations between nations." Brief of the United States at 17 n.11, *Boos v. Barry*, 485 U.S. 312 (1988) (arguing that special security restrictions around foreign embassies were justified as a

> These obligations were all entered into as part of a very aggressive effort of the United States Government to protect American citizens abroad. To get protection for Americans abroad in our treaties, it was necessary to provide reciprocal protections to foreign nationals in the United States. We obviously can't insist that other countries comply and then not comply ourselves. So it is both right and fair that we comply.[12]

Taft, *supra*, at 15. Significantly, the *Foreign Affairs Manual* also recognizes the reciprocal nature of Vienna

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necessary part of our reciprocal obligations under the Vienna Convention on Diplomatic Relations and asserting that in "appealing to the justice and the humanity of [other] governments to protect our embassies. . . at least we must show some intent upon our part to treat their embassies and their consulates in our country the same way."). *See also* Geofroy v. Riggs, 133 U.S. 258, 271 (1890) ("It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them.").

[12] A similar statement was issued by the U.S. Department of State in a case involving a Paraguayan national who was executed in Virginia and who was never informed of his Vienna Convention rights. According to the Department of State, "[w]e fully appreciate that the United States must see to it that foreign nationals in the United States receive the same treatment that we expect for our citizens overseas. We cannot have a double standard." Press Statement by James P. Rubin, Spokesman, U.S. Department of State, Released in Asuncion, Paraguay (Nov. 4, 1998), *available at* http://secretary.state.gov/www/briefings/statements/1998/ps981104.html.

Convention obligations and the implications of non-compliance in the United States. It acknowledges that foreign governments may not comply with Vienna Convention obligations because "U.S. authorities do not always promptly notify that country's consular representatives of the arrest of one of their nationals." U.S. Dep't of St., 7 *Foreign Affairs Manual* § 421.2-3 (Sept. 3, 2004). In these situations, U.S. consular officials are instructed to point out that "[e]ven where this might be true, it does not exempt the host government from its treaty obligations. Two wrongs do not make a right. We should all work toward improved compliance with consular notification obligations." *Id.* at 421.2-3(a).

There are many reasons why countries comply with international law, "including the unarticulated recognition by states generally of the need for order, and of their common interest in maintaining particular norms and standards . . . ." Restatement (Third), *supra*, at pt I (intro. note). Reciprocity also promotes cooperation and compliance. Accordingly, the United States must recognize the consequences of violating the Vienna Convention, both for the national interest and for the well-being of its citizens.

CONCLUSION

In *The Western Maid*, 257 U.S. 419 (1922), Justice Holmes noted that "[l]egal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp." *Id.* at 433. This Court must affirm and give effect to the obligations of the United States under the Vienna Convention or risk transforming the rule of law into a ghostly apparition that is seldom seen and never heard. This latter outcome does not serve the interests of the United States, the interests of its citizens, or the *Amici*,

who seek to promote respect for the rule of law in their own work on a daily basis.

For these reasons, this Court should reverse the judgments of the Supreme Courts of Virginia and Oregon and grant relief that is consistent with the obligations set forth in the Vienna Convention.

Dated: December 20, 2005

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DEC 2 1 2005

NOS. 04-10566 AND 05-51

In The Supreme Court of the United States

MOISES SANCHEZ-LLAMAS,

Petitioner

v.

OREGON

Respondent.

MARIO A. BUSTILLO,

Petitioner

v.

GENE M. JOHNSON, DIRECTOR OF VIRGINIA DEPARTMENT OF CORRECTIONS

Respondent.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF OREGON AND THE SUPREME COURT OF VIRGINIA

BRIEF OF AMICI CURIAE THE EUROPEAN UNION AND MEMBERS OF THE INTERNATIONAL COMMUNITY IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The European Union (EU) considers the respect for treaty based rights to be of vital importance both nationally and within the international community. This principle is common to its twenty-five Member States: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. Like the United States, all EU Member States are party to the Vienna Convention on Consular Relations (VCCR).[2] Article 36 of the VCCR (Article 36) confers both individual and State rights. As such, the EU has an interest in securing compliance with rights guaranteed under Article 36. This position has been expressed to the Government of the United States through specific demarches in cases involving individual foreign nationals who have been deprived of their rights under Article 36.[3]

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[1] In accordance with Supreme Court Rule 37.6, *amici* represent that no party other than *amici* and counsel for *amici* authored this brief in whole or in part, and no person or entity, other than *amici* and counsel, have made a monetary contribution to the preparation or submission of this brief. Global consent letters from all parties for all *amicus curiae* briefs are on file with the Clerk of the Court. Counsel acknowledge the valuable coordination and research for this project from Anne James, Executive Director and Joanne Cecil, Project Assistant, International Justice Project.

[2] *Opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

[3] Demarches in the cases of foreign nationals were transmitted in each of the following: Javier Suarez Medina, Texas (Mexican), 23 July, 2002; Hung Thanh Le, Oklahoma (Vietnamese), 4 December, 2003; Gerardo Valdez, Oklahoma (Mexican), 13 July, 2001; Osvaldo Torres, Oklahoma (Mexican) 30 April, 2004. All these communications can be found on the Internet, *EU Policy and Action on the Death Penalty, at* http://www.eurunion.org/legislat/DeathPenalty/deathpenhome.htm#ActionnonUSDeathRowCases. See, also European Union, *Guidelines to EU Policy Towards Third Countries on the Death Penalty* (June 3, 1998), Part III(v) *at* http://www.eurunion.org/legislat/DeathPenalty/Guidelines.htm.

As nations committed to the rule of law, the Member States of the EU have a fundamental interest in compliance with international instruments, particularly when the rights of a Member State's national may be in the balance.

The EU believes that it can provide this Court with a special and unique perspective that is not available through the views of the parties.

Liechtenstein, Norway and Switzerland have explicitly expressed to the European Union and its Member States their shared interest as *amici* and their support for the arguments put forward in the present brief.

The positions taken in the following arguments, while expressed as those of the European Union, are shared by all signatories to the brief.

SUMMARY OF ARGUMENT

Article 36 confers on detained foreign nationals a right to be informed, without delay, by the arresting authority, of the right to contact consular officers of the Sending State. The right to be so informed is an individual right (as well as a right accorded to the Sending State). If the foreign national is convicted without being informed of the rights under Article 36, that individual must be allowed to apply to a court in order to challenge the conviction and sentence by claiming, in reliance on Article 36 (1), that the competent authorities failed to comply with their obligations to provide the requisite consular information.

Courts must conduct such a review even if their procedural rules, such as those relating to default of claims, would otherwise preclude review. These propositions have been

affirmed by the International Court of Justice (ICJ).[4] Furthermore, the right to consular access is a right protected under customary international law and must therefore be observed.

ARGUMENT

I. THE VIENNA CONVENTION ON CONSULAR RELATIONS IS A KEY FORM OF PROTECTION FOR FOREIGN NATIONALS

The VCCR, a product of the Conference on Consular Relations convened by the United Nations General Assembly in 1963, is a global multilateral treaty that governs consular relations and regulates many aspects of the relationship of foreign consuls to a host Government. The VCCR has been ratified by 168 States (including the United States on November 24, 1969) and is the cornerstone of international consular relations.[5] Its conclusion is regarded as "the single most important event in the history of the consular institution. Indeed, after 1963, there can be no settlement of consular disputes or regulation of consular relations, whether by treaty or national legislation, without reference or recourse to the Vienna Convention".[6]

The Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement

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[4] *LaGrand (F.R.G. v. U.S)*, 2001 I.C.J 104 (Jun. 27); *Avena and other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31).

[5] United Nations, *Multilateral Treaties Deposited with the Secretary-General, Vienna Convention on Consular Relations, at,* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty31.asp.

[6] LUKE LEE, CONSULAR LAW AND PRACTICE at 26 (2d. ed. 1991).

of Disputes (Optional Protocol) provides that disputes "arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice".[7]

The ICJ is "the principal judicial organ of the United Nations" (U.N.).[8] The Court's statute is annexed to the U.N. Charter; therefore, States which become members of the United Nations also become parties to the Statute.[9]

The United States[10] and Member States of the EU are party to the United Nations Charter. Respect for ICJ judgments by States that are party to litigation is a basic principle of the international legal order as articulated in the United Nations Charter, Article 94: "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party".

Article 36 recognizes the rights of consuls to communicate with and assist their nationals. Article 36 also confers specific rights on detained or imprisoned foreign nationals. As the United States Government has noted before the International Court of Justice, Article 36 "establishes rights not only for the consular officer, but perhaps more importantly for the nationals of the Sending State who are

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[7] Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *opened for signature* Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 261.

[8] U.N. Charter, *opened for signature* June 26, 1945, 59 Stat. 1031, T.S. No. 993, Article 92; Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993.

[9] U.N. Charter, Article 93, para.1.

[10] The United States ratified the U.N. Charter on August 8, 1945. United Nations, *Multilateral Treaties Deposited with the Secretary General, Charter of the United Nations, at,* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterI/treaty1.asp

assured access to consular officers and through them to others."[11]

Article 36 requires a Receiving State to inform detained foreign nationals of their right to communicate with their consulate and to facilitate access between detained foreign nationals and consuls of the Sending State. In addition, Article 36 confers specific State rights, recognizing the right of consuls to have access to, communicate with, and assist their detained national. Further, it establishes an obligation upon the Receiving State under paragraph 1 (c) of Article 36 to enable the consular officers to arrange for legal representation of their nationals.

The significance of consular access has been expounded upon by the Inter-American Court of Human Rights (IACtHR). The IACtHR stated that "notification of the right to communicate with a consular official of his country will materially improve his possibilities of a defense," and "procedural measures, including those taken by the police, will be done with greater concern for legality and greater respect for the dignity of the person."[12] The IACtHR stated that the right to be informed of the right to consular access "is a means of defense for the accused that is reflected, on occasion in a determinative way, in the respect shown for his other procedural rights".[13]

EU Member States consider consular access to be of critical importance. A foreign national faces unique disadvantages when left to navigate the foreign country's legal system in

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[11] U.S. Diplomatic and Consular Staff in Tehran (*USA v. Iran*), ICJ Pleadings, at 174.

[12] *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, para. 121, Advisory Opinion OC-16/99, Inter-American Court of Human Rights (1999).

[13] *Id.* para 123.

the absence of support from his home nation, even if he is represented by competent legal counsel. Article 36 reflects agreement among the States parties that foreign nationals require special assistance when they are detained on a criminal charge.

Participation by a consul provides greater assurance that a Sending State's national will understand the rights afforded by the law of the Receiving State, and correspondingly that the proceedings will be conducted as intended under the law of the Receiving State.

In a particular case, a consul may be able to assure that the accused is represented by a competent attorney who possesses a cultural understanding of the national's specific circumstances and background. Consuls may also be able to acquaint their nationals with the basic procedures under the local legal system.

Accurate translation may also be of importance. A consul may be able to assist in securing expert translation, the result of which could provide both an effective understanding by the national of his legal rights and the assurance for the arresting authority of a thorough and accurate comprehension of the national's statements.

A consul may assist in locating witnesses or documentary evidence available in the Sending State. The information thus gained may be critical in a determination of guilt, and, in the event of a conviction, in the assignment of an appropriate sentence.